BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

ANTONIO SANTIAGO CORTEZ	)	
Claimant	)	
V.	)	
	)	Docket No. 1,062,942
DANIEL HERNANDEZ	)	
Respondent	)	
AND	)	
	)	
TECHNOLOGY INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent its insurance carrier requested review of the August 12, 2015, Post-Award Medical Award by Administrative Law Judge (ALJ) Ali N. Marchant.

APPEARANCES

Gary K. Albin, of Wichita, Kansas, appeared for claimant. Ryan D. Weltz, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ found claimant presented sufficient competent medical evidence to overcome the presumption against further medical care for his work-related injury and denied respondent's application for termination of medical benefits.

Respondent appealed, arguing claimant failed to demonstrate his entitlement to additional and/or future medical treatment and failed to introduce any new evidence to rebut the statutory presumption that medical benefits should terminate. Therefore, claimant is not entitled to future medical treatment and the ALJ's denial of respondent's motion to terminate medical benefits should be reversed.

Claimant has not filed a brief, but presumably argues the ALJ's Order should be affirmed.

The issue on appeal is whether claimant has rebutted the statutory presumption contained in K.S.A. 44-510k that no future medical treatment is needed as a result of claimant's work-related injuries.

FINDINGS OF FACT

While working for respondent, claimant fell off a roof on September 1, 2012, and fractured the tibia and fibula of his right leg. Claimant was taken to Via Christi Hospital in Wichita, Kansas, where he underwent surgery, under the care of board certified orthopedic surgeon, Anthony G. Pollock, M.D., consisting of an open reduction and internal fixation of a tibia fracture, and the successful realignment of a fibular fracture. During the surgery, a rod and several screws were inserted into the tibia. Claimant was discharged from the hospital on September 4, 2012, with a walker and the restriction of non-weightbearing activity on his right lower extremity.

Claimant met with Dr. Pollock again on September 20, 2012. Claimant appeared to a have a good result from the surgery and was allowed to start range of motion exercises involving his knee and ankle. Claimant was instructed to return in one month.

At an October 18, 2012, visit, Dr. Pollock determined claimant was able to start weightbearing as tolerated. Claimant remained off work. A month later, on November 15, 2012, claimant was continuing to improve. When claimant asked about returning to work, he was told he could not. Claimant was scheduled to return to Dr. Pollock in one month, but did not see the doctor until March 2013, at which time Dr. Pollock opined claimant could return to work. Dr. Pollock understood claimant no longer wanted to do roofing work. Claimant tried working as a dishwasher, but was not able to do that. Claimant was released to full activity.

On July 29, 2013, in a letter to respondent's attorney, Dr. Pollock wrote that, although claimant complained of pain in his ankle, he had no impairment of function and was released without restrictions to full duties. However, on cross-examination, Dr. Pollock acknowledged that the AMA *Guides*, 4th ed. might provide a functional impairment rating for an undisplaced tibial plateau fracture. The doctor also acknowledged that significant atrophy present in August 2013, may entitle claimant to a functional impairment rating.

Regarding future medical treatment, Dr. Pollock stated:

> Q. . . . do you have an opinion as to whether it's reasonably foreseeable that he might need some future medical attention, of some medical attention in the future perhaps related to the instrumentation that's been inserted?

> A. It's not common. It's pretty rare to have to do anything, except perhaps to remove some of the screw heads, or rather the screws, and usually, because the screw heads sometimes cause some -- well, you can feel them sometimes on a skinny individual.
>
> I removed two today on somebody a year out from surgery. But it's not by any -- probably less than 10 percent get that done. So if they complain of pain there and it bothers them a lot physically or emotionally, we take them out.[1]

Claimant continues to have pain on the inside of his right leg that sometimes travels from his ankle up halfway toward his knee. Claimant indicated that sometimes he is unable to work because of the pain. Claimant also indicated that he developed swelling in his leg, but denied any accidents or injuries since September 2012. Claimant described sensations in the area of his surgical scar which feel like one of the rods in his leg is starting to poke out.

Claimant testified that, following his release from Dr. Pollock's care in March 2013, he continued to have problems with his right leg. Claimant told the doctor about the pain he was having from his shin all the way up to his knee. Claimant testified the pain in his right leg keeps him from walking properly.

Claimant met with board certified physical medicine and rehabilitation specialist Pedro A. Murati, M.D., for an examination on April 17, 2013, at the request of his attorney. Claimant's complaints were pain in his right knee and leg, walking with a limp due to right leg pain, and worsening of right leg pain with walking. Dr. Murati recommended an MRI and injections.

On August 1, 2013, Dr. Murati again examined claimant and amended his original report to include an impairment rating and to recommend yearly follow-up examinations of claimant's right lower extremity in case of complications. Dr. Murati also recommended the hardware in claimant's leg be removed and a right knee replacement be considered in the future.

Claimant met with physical medicine and rehabilitation specialist David E. Harris, D.O., for a court-ordered IME on November 4, 2013. Dr. Harris determined claimant's right lower extremity injury was related to claimant's work and assigned permanent impairment. He opined claimant will continue to have pain from his injuries. Dr. Harris expressed no opinion concerning the possible need for future medical treatment.

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[1] Pollock Depo. at 15-16.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2012 Supp. 44-510h(e) states:

> (e) It is presumed that the employer's obligation to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515, and amendments thereto, shall terminate upon the employee reaching maximum medical improvement. Such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement. The term "medical treatment" as used in this subsection (e) means only that treatment provided or prescribed by a licensed health care provider and shall not include home exercise programs or over-the-counter medications.

K.S.A. 2012 Supp. 44-510k(a)(3) states:

> (3) If the claimant has not received medical treatment, as defined in subsection (e) of K.S.A. 44-510h, and amendments thereto, from an authorized health care provider within two years from the date of the award or two years from the date the claimant last received medical treatment from an authorized health care provider, the employer shall be permitted to make application under this section for permanent termination of future medical benefits. In such case, there shall be a presumption that no further medical care is needed as a result of the underlying injury. The presumption may be overcome by competent medical evidence.

The Board acknowledges a significant amount of time has passed since claimant last sought or obtained medical treatment for the injuries suffered on September 1, 2012. The Kansas Legislature has created a presumption that, upon reaching MMI, a claimant will no longer need future medical treatment. This is a significant variation from past medical treatment being practically unlimited.

Claimant has testified to ongoing pain in his leg. At times, it feels like something is trying to poke out. Dr. Pollock, the authorized treating physician, acknowledged occasionally a patient will have problems with the hardware placed in his or her leg. Removal of that hardware can then become necessary. While Dr. Pollock testified this was unusual, he was not willing to rule out that possibility. Claimant suffered a serious injury from the fall while working for respondent. The Board finds it inappropriate to terminate all medical treatment in this instance when the possibility exists that future surgery may arise if claimant's pain complaints become more significant.

Claimant has overcome the presumption in K.S.A. 2012 Supp. 44-510k, that he no longer needs future medical treatment. The ALJ's denial of respondent's Application for termination of Medical Benefits is affirmed.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Post-Award Medical Award of the ALJ should be affirmed. Claimant has overcome the presumption that he will not need additional medical treatment in the future for the injuries suffered in the work-related accident on September 1, 2012.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Post-Award Medical Award of Administrative Law Judge Ali N. Marchant dated August 12, 2015, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of October, 2015.

_____
BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

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Ali N. Marchant, Administrative Law Judge